

The claimant injured her right knee when she slipped and fell exiting the shower while on a business trip in Spain. Respondent denied that the accident arose out of and in the course of her employment. The Administrative Law Judge (ALJ) determined the injury was compensable and awarded claimant compensation for a 19 percent scheduled disability to her right leg.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment and, if so, the nature and extent of disability. Respondent argues claimant was engaged in an activity of day-to-day living, showering in the morning, and not a work activity at the time she fell. Consequently, respondent further argues the claim is not compensable. In the alternative, if the claim is determined to be compensable, respondent argues claimant should only be entitled to a 12.5 percent right lower extremity impairment.

Claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent and acted as a liaison with travel agencies that booked trips for customers with respondent. As part of her job she would occasionally travel to locations where the cruises stopped in order to research the ground facilities and as part of the travel package tell customers what to expect. She explained her duties in the following fashion:

Q. First, tell us why you were in Madrid, Spain?

A. Basically we get these competitions and we got a chance to go to Spain to learn more of the cruise portions, the land portions that go with our cruises. And it's basically a training experience, due to the fact that I sell cruise tours. And by being there and getting a chance to see the country, the things we offer in our cruise tours it helps me to advise the travel partners, you know, what, you know, what experiences to expect and that type of thing. It's just basically a learning experience.

Q. You were sent there by your employer?

A. Correct.

Q. And the purpose was to find out what benefits you could provide your customers?

A. Right, to travel partners. And basically we do a lot of teaching as far as, you know, telling them different, you know, aspects. Like for instance, a cruise tour is commissionable where if a travel agent books with a shore excursion for a guest it is not, so it's more completely for experience.

Q. And this time I guess you are learning about the onshore experiences?

A. Exactly.

Q. And this is part of your job?

A. Yes.

Q. And Royal Caribbean paid for your trip?

A. Yes.¹

While in Madrid Spain as part of her business trip for respondent the claimant was staying at the Grand Canarias hotel. On the morning of September 27, 2006, as she stepped out of the shower she slipped and fell. She described the incident as follows:

Q. Tell us what happened when you were in Madrid, what happened there?

A. Well, I was just getting around in the morning, getting ready to go down for breakfast and I took my shower, stepped out from the shower and I slipped and I fell. I am not sure if it's this trellis thing that was in the bottom of the shower, I am not sure what it was, it was a wood type of platform thing, the bottom of the shower, or if it could have been a wet bath mat from my roommate, but I stepped out and I kind of did the splits. The only thing is I am not that flexible, and I landed on the right knee and later found out it was broken.²

Claimant noted that her leg from the knee to the foot was swollen. Claimant did not seek medical treatment in Spain and the next day she flew back to the United States. She went to the emergency room at Via Christi St. Joseph Hospital in Wichita, Kansas. X-rays were taken and the next day she went to her personal physician and was apparently told that it did not appear that she had suffered any fractures.

Respondent then referred claimant to Occupational Health Services where she was treated by Dr. Mark Dobyns. Additional x-rays were taken and claimant was diagnosed with a right knee contusion, right knee sprain and right ankle sprain. Claimant was placed in a CAM walker but her pain continued and she returned to the doctor who prescribed an MRI of the right knee. The MRI revealed a comminuted intraarticular fracture of the posterior tibial plateau, a strained posterior cruciate ligament, and a tear of the medial collateral ligament at the femoral attachment.

¹ R.H. Trans. at 9-10.

² *Id.* at 10.

Claimant was then referred to Dr. John D. Osland who saw the claimant on November 3, 2006. The doctor performed an examination and diagnosed claimant with a tibial plateau fracture and medial collateral ligament sprain. Dr. Osland recommended claimant be placed in a brace with her knee locked at 30 degrees for optimal positioning. Claimant was also provided physical therapy. On May 15, 2007, Dr. Osland determined claimant was at maximum medical improvement.

Based upon the *AMA Guides*³, Dr. Osland opined claimant had a 7 percent permanent partial lower extremity impairment due to mild collateral ligament laxity and a 5 percent to the lower extremity for muscle weakness and mild cruciate instability. These impairments combine for a total 12 percent lower extremity impairment. The doctor did not impose any permanent restrictions on claimant because she was doing her regular work.

Dr. Pedro A. Murati examined claimant on September 10, 2007, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with knee pain with mild flexion contracture and patellofemoral syndrome on the right. The doctor opined that claimant's current diagnoses are a direct result of her work-related injury that occurred on September 27, 2006.

Based upon the *AMA Guides*, the doctor concluded claimant had a 13 percent right lower extremity impairment due to atrophy of the right thigh; 10 percent right lower extremity impairment due to knee pain with mild flexion contracture; and a 5 percent right lower extremity impairment for the right patellofemoral syndrome. Using the Combined Values Chart, these right lower extremity impairments combine for a 26 percent.

Respondent initially argues that claimant's accidental injury is not compensable because there was no nexus between the activity which resulted in her injury and the claimant's work duties. Stated another way, respondent argues the claimant was engaged in a personal activity when the accident occurred.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁴

In *Blair*,⁵ the Court held that when a business trip is an integral part of the claimant's employment the "entire undertaking is to be considered from a unitary standpoint rather than divisible." See also, 2 *Larson's Workers' Compensation Law* § 25.01 which states:

Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

In this case there is no dispute that claimant was on a business trip when the slip and fall occurred. As long as the trip or task is an integral or necessary part of the employment an injury during any portion of the trip or task is compensable. In the recent *Halford*⁶ case the Court of Appeals restated and adopted the rationale of *Blair* in the following fashion:

As emphasized by our court in *Mendoza* and *Brobst*, this exception extends to the normal risks involved in completing the task or travel, and the required perspective is to view the task or trip as unitary or indivisible, meaning an injury during any aspect thereof is compensable. See *Blair v. Shaw*, 171 Kan. 524, 528, 233 P.2d 731 (1951) (entire trip by mechanics from annual certification test was integral to employment, causing deaths during trip to be compensable). So long as the employee's trip or task is an integral or necessary part of the employment, this exception applies to assure compensability for an injury suffered *during any portion of such trip or task*. See *Kindel*, 258 Kan. at 277.

Applying the principles announced in the above-referenced cases and treatise, the Board concludes that attendance at the hotel was incidental to claimant's employment and *Blair* requires the entire undertaking to be viewed as indivisible. Moreover, as a result of her travel claimant was required to bathe in unfamiliar surroundings as demonstrated by the wooden platform in the shower. There is nothing to suggest claimant had departed on a personal errand, consequently, compensation is awarded since her injuries were sustained during an activity which was reasonably incidental to her work-related travel.

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995)

⁵ *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951).

⁶ *Halford v. Nowak Const. Co.*, ___ Kan. App. 2d ___ 186 P.3d 206, 211 (2008). This case is not final and may be subject to review.

Respondent next argues that the functional impairment should be reduced to 12.5 percent.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.⁷ The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁸ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁹

Dr. Pedro A. Murati concluded claimant had a 13 percent right lower extremity impairment due to atrophy of the right thigh; 10 percent right lower extremity impairment due to knee pain with mild flexion contracture; and a 5 percent right lower extremity impairment for the right patellofemoral syndrome. Using the Combined Values Chart, these right lower extremity impairments combine for a 26 percent. Dr. Osland opined claimant had a 7 percent permanent partial lower extremity impairment due to mild collateral ligament laxity and a 5 percent to the lower extremity for muscle weakness and mild cruciate instability. These impairments combine for a total 12 percent lower extremity impairment by Dr. Osland.

The ALJ determined claimant's permanent partial disability was 19 percent based upon an average of the two doctor's ratings. After considering both doctors' opinions as well as the claimant's testimony, the Board finds that an average of the ratings provided by both doctors is appropriate. Thus, the ALJ's Award is affirmed.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated July 28, 2008, is affirmed.

IT IS SO ORDERED.

⁷ K.S.A. 44-510e(a).

⁸ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁹ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

Dated this _____ day of November 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James A. Cline, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge